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In The

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is to strengthen the ability of individuals to control and transfer property and to demonstrate that property rights are inextricably connected with other civil rights.

Although the question in this case specifically addresses the ripeness doctrine, the case also presents larger issues involving private property rights and the proper scope of administrative processes in a free society. The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago School of Law, one of the nation's leading authorities on property law.

The Institute for Justice has obtained the consent of the parties to filing this brief and letters of consent have been filed with the Clerk.

STATEMENT OF FACTS

Bernadine Suitum owns an ordinary residential lot of 18,300 square feet. She and her late husband bought the property in 1972. The lot's size would support construction of a single-family home indistinguishable from those of her more fortunate neighbors who already have built their homes. But her development rights have been sharply regulated and curtailed by the Tahoe Regional Planning Agency (TRPA). Pursuant to its comprehensive planning ordinance, TRPA has deprived Ms. Suitum for all time of the right to build on her land. In exchange, the State of Nevada, under the Tahoe Basin Act, appears ready to negotiate the purchase of the lands so encumbered for a sum estimated at $35,000. *See* Johnson Suppl. Aff. ¶ 12. Although the record is not clear on the point, a buildable lot appears to be worth far more money.

Alternatively, TRPA allows Ms. Suitum to sell, separately or in combination, two remnants of her fee simple ownership. First, she may sell her land, but subject to the same development constraints – assuming she can find a buyer. Second, she may sell a set of transferable development rights (TDRs) to some other person within the planning region for a fraction of the value of her own lot as a building site. It appears from the record that the combined value of these two rights is less than that of her land as a buildable lot.

TRPA denies that its elimination of Ms. Suitum's right to develop her own land constitutes a compensable taking under the Fifth Amendment to the United States Constitution. Indeed, it denies that the case is even ripe for adjudication in federal court. That decision is incorrect on both the procedural and substantive aspects of the case. The purpose of this *amicus curiae* brief is to expose the constitutional infirmities of TRPA's decision.

Some brief background helps place this case in perspective. In 1987, TRPA inaugurated a comprehensive plan to regulate, and often prohibit, new construction within its planning region. Each plot within the area was assessed for its ostensible suitability for construction under an elaborate set of criteria. Under this complex scheme, TRPA has created Stream Environment Zones (SEZs) which cover those lands that are located near the stream that feeds Lake Tahoe. Land located in these zones is not eligible for new private construction under any circumstances. The decision is categorical and does not depend on any individualized showing that the proposed plan of construction would interfere with the drainage within the region.

Under TRPA's general plan, however, an owner, such as Ms. Suitum, who is denied all right to build on her own land receives in exchange either:

(1) an alleged willingness on the part of some government entity to buy the land for less than its fair market value as a buildable lot, or;

(2) a package of residential development rights, land coverage rights; and residential allocations.

All of the elements of the package listed as the second option are TDRs, the combined value of which appears to be worth less than a buildable lot. These rights may be transferred *if* the owner can find a buyer. That buyer, however, does not receive any automatic right to build either, as the completed transfer is subject to approval which will only be granted if certain requirements on use and density are met. TRPA does not organize this resale market, but leaves it for holders of TDRs to fend for themselves. Some sales are reported of these development rights for sums that range between $1,500 to $6,000, and building allocations for between $17,000 and $25,000. *See* Johnson Suppl. Aff. ¶ 13. There is no mention of how long it takes to sell a TDR or of the expenses incurred in the sale.

TRPA determined that Ms. Suitum's land was located within an SEZ, precluding all development. Therefore, she was left with the unbuildable lot coupled with a residential development right and land coverage right equal to 183 square feet, or one percent of the surface area of her own land. She has not tried to sell any of these development rights, but instead brought an action in federal court arguing that the net effect of the regulations deprived her of all economically viable use of her land, thus constituting a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. In an unreported decision, the United States District Court for the District of Nevada granted TRPA summary judgment, ruling that the issue was not ripe. This ruling was affirmed in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996).

SUMMARY OF ARGUMENT

This case raises the fundamental question of whether planning authorities can engage in a series of maneuvers that will render it impossible for landowners who have suffered regulatory takings to ever recover full and perfect compensation for their loss guaranteed under the Fifth Amendment to the United States Constitution. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). From the time of Shakespeare to the present, it has been well understood that justice delayed is justice denied. TRPA demonstrates the modern truth of Shakespeare's maxim through its scheme of regulation that makes it well-nigh impossible for any court to review TRPA's confiscatory regulations. Seizing on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), TRPA consciously has placed obstacle after obstacle in the path of ordinary landowners of limited means who desire no more than to build a house similar in kind and nature to that of their neighbors.

In many situations involving property regulation, the due process clause is violated because too little process has been given to an owner. But in this case the vice is exactly the opposite: not too little process, but too much. Grant Gilmore concluded his famous Storrs Lectures with words that could have been written with this case in mind: "Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. . . . An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Age of Anxiety*, 84 Yale L.J. 1022, 1044 (1975).

. Landowners like Ms. Suitum suffer from a process whose elaborate uncertainty denies any means of vindicating constitutional rights. The landowners' plight

stems directly from the finality rules erected by this Court in *Williamson*. Local governments and regional planning authorities know that so long as they have made no final judgment their conduct will not be reviewed in federal court. Not surprisingly, TRPA seeks to indefinitely expand this period of delay. To do so, it has developed a complex system whereby it fractionates the development rights associated with an ordinary parcel of land into a number of separate components. Ms. Suitum did not apply to transfer her residential development right or available land coverage right under the program. Those tasks require multiple forms and complicated negotiations with other private parties before sale, assuming they can be found. The costs of going through these maneuvers could easily chew up much of the value of her rights and might exceed their value in some cases.

TRPA throws the entire burden of this uncertainty on Ms. Suitum and then seizes on this very uncertainty and resulting delay to bar the door to the federal courthouse. This Court should not extend the ripeness requirement of *Williamson* to require additional private negotiations that have nothing to do with the intrinsic use or value of the land, and everything to do with concealing the paltry and thoroughly inadequate compensation that a governmental entity may offer for a formerly buildable lot.

TRPA has made its final offer, and, as a matter of law, that offer does not satisfy the constitutional requirements of just compensation. TRPA has already decreed that Ms. Suitum will never make any actual use of her land. Nonetheless, TRPA contends, and the Ninth Circuit agreed, that she still can make two valuable "uses" of her land. The first "use" is to sell the land to an adjacent owner who could annex that land to his own parcel. The second "use" is to apply for and sell TRPA's package of transferable development rights. These propositions confuse an owner's right to use her own property with the owner's

obligation to sell it in order to minimize the state's constitutional duty to provide just compensation for the state-imposed restrictions.

TRPA is not so brazen as to claim that no compensation will be offered. Instead it offers compensation in the form of TDRs which are difficult to value under any circumstances, and whose value falls far short of the "full and perfect compensation in money for the property taken" necessary to make the holder of property indifferent between the land that was lost and the compensation received in exchange. *See United States v. Miller*, 317 U.S. 369, 373 (1943).

The simple and just solution to all these problems is for TRPA to buy the land for fair market value and resell it, or its associated development rights, as it pleases. TRPA should not be allowed to hide its unconstitutional tactics behind the ripeness doctrine. Once Ms. Suitum's right to build is denied, her claim to compensation is perfected so that it becomes the duty of TRPA to pay in cash, or in cash equivalents, the requisite constitutional amount – namely, the fair market value of the plot of whose use she has been deprived. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-26 (1893). TRPA's deliberate effort to inject massive uncertainty into the compensation question should not become a royal road to avoid compensation altogether.

ARGUMENT

I. THE DECISION OF TRPA WAS FINAL AND RIPE FOR ADJUDICATION THE MOMENT IT DENIED MS. SUITUM ANY RIGHT TO DEVELOP HER OWN LAND.

This Court has created a ripeness requirement in takings cases in order to make sure that cases not ready for complete disposition are kept out of the federal courts. The impulse behind the ripeness doctrine is one of judicial economy. Where money will compensate an individual for economic losses, there is little danger in deferring judicial consideration of the matter until all administrative rulings have been made. By waiting until that moment, the controversy may well disappear, and if it does not, all aspects of the case can be resolved in a single proceeding, with enhanced judicial efficiency and reliability.

Administrative efficiency is, however, only one element of the proper judicial calculus. Preservation of constitutional rights surely is another. Access to courts offers vital protection in our system of constitutional government with its explicit limitations on the power the state may exert over its citizens. The ripeness requirement in *Williamson* relieves the state of the obligation to pay compensation in a particular case until the transaction itself has been closed in order to reduce the stress on the court system, as discussed *infra* at 9-11. But postponing access to the courts until the entire matter can be resolved in a comprehensive fashion increases the risk that redress will be denied for serious and prolonged constitutional violations. The longer the period of delay, the greater this risk of potential abuse. Ironically, the ripeness doctrine can create a perverse incentive for overzealous governments to create endless procedural hurdles calculated to deny landowners the use or value of their property.

The district court below introduced a whole new set of imponderables into its ripeness calculation. Just how much effort in the private market must people make before they can bring their claims to court? Must advertisements be placed in local newspapers and brokers hired? Does it matter that the landowner must bear these costs if the effort to sell fails? The balance between judicial efficiency and legal protection must at some point shift in favor of opening the courthouse door. That point has been reached, and passed, here. State planning boards must not be allowed to take advantage of *Williamson* to place further roadblocks before the courthouse door. Finality must become a legal reality, not an administrative mirage, manipulated by the very parties that profit by their insulation from judicial review.

TRPA also undermines the decision of this Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that temporary takings by regulation should be treated like temporary takings by direct occupation. Of what value is that remedy if a governmental body can string out its deliberations over the fate of a particular landowner during periods of "normal delay" for administrative matters. *See First English*, 482 U.S. at 321. That period of delay should not be lengthened to cover administrative and business matters unrelated to the use of the land at issue.

As a matter of basic due process, all individuals have a right to have their dealings with government agencies subject to timely and effective review in a court. In dealing with this issue, this Court should not forget that administrative agencies do not have internal gyroscopes that automatically insure that their every action serves the public interest. These agencies have institutional incentives and agendas of their own. Planning commissions are not neutral and disinterested arbitrators of disputes. The agencies often are responsible for the

enforcement of the very policies they promulgate. Separation of powers is thus compromised in administrative settings, and some bias in the execution of their mandate is likely to occur given the dual rules that are occupied. Those agencies having a strong interest in the outcome of a dispute have an incentive to adopt measures that will allow them to advance that interest, even by trampling the rights of ordinary individuals in the process.

Williamson does not invite this dangerous extension of the ripeness requirement. Under its rule, a claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. For the purposes of this case, the key words of this holding are "property at issue." The natural meaning of those words is the property subject to the regulation at hand, which in this case is Ms. Suitum's lot for which all permission to build has been denied in perpetuity. Surely, the property at issue cannot be any other piece of land to which the TDRs, if sold, might eventually attach. The TDRs are not a "use" of Ms. Suitum's property, but are, and are understood by everyone, to be offered in compensation for the property that is lost. *See, e.g.*, Note, *The Unconstitutionality of Transferable Development Rights*, 84 Yale L.J. 1101, 1107 (1975) ("once a TDR is found to be a taking, the question then becomes whether the freely transferable development rights awarded to the landmark owner by the city constitute just compensation"). Likewise TDRs were treated as a form of compensation, not a different version of the property itself, in both the majority and dissenting opinions in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 137 (1978) (Brennan, J.); *Id.* at 151 (Rehnquist, J., dissenting).

Any other conclusion would defy common sense. Surely, Ms. Suitum does not receive some use of her land if TRPA gives her an option to buy Kansas real estate,

1000 shares of GM stock, a state lottery ticket, or a free AMTRAK pass. Use of her own land has been permanently taken from her and TDRs are offered in compensation. The land to which those TDRs might pertain has not even been identified, and the sale of the TDRs would hardly give Ms. Suitum any interest in the land to which they are eventually attached. The only land at issue in this case is her plot of land, and there TRPA has issued its final and decisive order: no development, ever.

Moreover, this common-sense interpretation of *Williamson* is borne out by an examination of the fact patterns to which the rule applies. In *Williamson* itself, the original developer, Temple Hills Country Club Estates, did not have a ripe claim because once its proposals were rejected it "did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and the subdivision regulations." *Williamson*, 473 U.S. at 188. Yet an application for a variance relates to the proposed plans for the development of the particular property. Nothing whatsoever in *Williamson* hints that some possible transaction with respect to an unidentified and unrelated parcel of land should delay access to federal court. Nor does *Williamson* suggest that a land owner is under some duty to place land for sale before attacking the system at hand. Only unresolved issues over future use of the discrete parcel prevented the owner's claim from being ripe.

This conclusion is fortified by the line of earlier Supreme Court cases on which *Williamson* relied. In *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 268 (1981), the landowners mounted a facial attack on the constitutionality of the Surface Mining Control and Reclamation Act of 1977, which required that strip-mined land be returned to its original contour once the work was done. That claim was rejected on the ground

that the landowners "have not availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirements of § 515(d) or waiver from the surface mining restrictions in § 522(c)." *Hodel*, 452 U.S. at 297, *quoted* in *Williamson*, 457 U.S. at 187. Once again the required process affected the property at issue; the failure to resell the land had nothing to do with the ripeness issue.

Williamson also relied on *Agins v. Tiburon*, 447 U.S. 255 (1980), where the challenge to a zoning ordinance "was not ripe because the property owners had not yet submitted a plan for development of their property." *Williamson*, 475 U.S. at 187. *Williamson* then brought home the essential point by referring to *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978), where the New York City Landmark Preservation Board had already disapproved a proposed 50 story office tower over Penn Station. That appeal was not regarded as ripe because "the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Williamson*, 475 U.S. at 187. Even though *Penn Central* involved the use of TDRs, their potential sale and the potential sale of the terminal were not treated as preconditions for access to federal court.

A sensible approach to the ripeness question was taken in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995). There, the City of Chicago passed an ordinance that restricted the rights of present owners to transfer their existing liquor licenses. An affected liquor store owner brought suit under 42 U.S.C. § 1983, claiming that the ordinance's restrictions on resale contravened both the equal protection and due process clauses. Chicago claimed that the action was not yet ripe because Marusic

had no immediate plans to sell his business. Judge Easterbrook rebuffed that contention under *Williamson*: "A claim is unripe when critical elements are contingent or unknown. When, for example, a property owner alleges that general regulation affects his land in some special way, the claim is not ripe until all efforts to *avoid the restriction or obtain compensation for it are exhausted.*" *Marusic*, 55 F.3d at 260 (emphasis added).

In *Marusic*, 55 F.3d at 261, the plaintiff was allowed to press forward his claim immediately "because the ordinance itself embodied a conclusive decision about transferability." Likewise, in the instant case, TRPA made its conclusive determination about use and has refused to pay full compensation. In *Marusic*, Judge Easterbrook did not require that Marusic seek out potential buyers for the land, or to show exactly how much the value had decreased. The fixed and final position of the City of Chicago was all that it took to make the case ripe. For these purposes, it is immaterial that the Seventh Circuit sustained the ordinance on its merits.

There is no question that if TRPA had baldly prevented any construction on Ms. Suitum's land, it would have been required to compensate her in full and in cash for the use rights that were so lost. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992). There is no showing that her proposed use of land amounts to a common law nuisance or to anything close to one. As Lucas' home construction was not a nuisance merely because he owned beachfront property, so too Ms. Suitum's proposed construction of an ordinary home is not a nuisance merely because the land is located in a stream enforcement zone. See *Restatement (Second) of Torts* §§ 826-831, *cited in Lucas*, 505 U.S. at 1030-31. It therefore makes no sense for the District and Circuit Courts to deflect her valid claim for compensation by postponing litigation until she disposes of a complex set of TDRs. The

critical question of the valuation of her property rights taken from her can be litigated today.

II. MS. SUITUM HAS NOT RECEIVED JUST COMPENSATION FOR THE TOTAL LOSS OF ANY ECONOMICALLY VIABLE USE OF HER PROPERTY.

A. The Just Compensation Clause Requires Full And Perfect Compensation For The Property Taken.

Once Ms. Suitum's claim is ripe, a court must determine whether or not her property has been taken within the meaning of the Fifth Amendment, and, if so, whether just compensation has been offered in exchange. The first issue is clear from the record, given the total deprivation of any economically viable use of her property. The point of contention is whether she has been justly compensated. The applicable standard for just compensation admits of no doubt:

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. . . .

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes – that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 326-27 (1893).

B. The Apparent Willingness Of A Governmental Entity To Purchase Ms. Suitum's Land At Below Market Value Does Not, As A Matter of Law, Provide Just Compensation.

TRPA's first effort to finesse the just compensation requirement is to point to the possibility that the State of Nevada may give Ms. Suitum a reduced price in cash for her land. But this part payment, even if it is ever realized, will not suffice. It is well recognized that a state cannot downzone property with an eye to its purchase at a reduced price. A court will cut through any apparent police power justification when local governments engage in such nefarious practices. For example, that result was achieved in *Riggs v. Township of Long Beach*, 109 N.J. 601, 538 A.2d 808 (1988). The court struck down an ordinance stating that "the purpose of the zoning amendment was not to fulfill the master plan, but to enable the municipality to pay the property owner less than fair

market value under the preexisting zoning ordinance." *Riggs*, 109 N.J. at 615, 538 A.2d at 815.

That result represents the proper response to the abuse of the police power present in this case. It is quite intolerable that a local government should be able to take land worth $100,000, zone it to a fourth of its original value, and then condemn it for $25,000. The very fact that governmental bodies in this case have allegedly sought to take land from owners for a below market price shows how these possibilities flout the just compensation requirement, not satisfy it. TRPA or some other governmental entity might as well claim it could avoid its duty to compensate for the loss of all economically viable use under *Lucas* by offering to pay $1.00 for the land. In the absence of the planning restrictions, Ms. Suitum surely would reject any such purported offer. The $35,000 figure should not be regarded as evidence that Ms. Suitum's land has residual value. It should be regarded as a telling admission that the government is always willing to condemn land for less than its full value, in violation of its constitutional obligations.

C. The Right To Sell The Encumbered Land To Neighbors Is Not, As A Matter of Law, Just Compensation For The Property Taken.

TRPA's next line of defense against paying compensation is that Suitum still has the right to sell the property that she cannot use. This means of compensation is far below the full and perfect compensation required from the government. Any sale requires a buyer. However, the class of potential buyers is limited to the class of adjacent neighbors who might wish to add someone else's plot onto their own. The exact price that would be paid cannot be determined short of actual negotiation, but it can be said with complete confidence that the net return to Ms. Suitum would be far less than the value of her land as a

building plot. The use that the buyer could make of the land is limited, because he could never build on the land either. The gain from the purchase is limited as well. The neighbor has no need to purchase the lot to prevent construction, as that already has been accomplished by regulation. Therefore, the most that can be gained is private access and perhaps some additional measure of privacy. These conditions are so restrictive as to block many sales, and to allow some for small amounts after difficult negotiations. That paltry residue is far below the full and perfect compensation required under the Constitution. Moreover, that possibility exists in *every* case in which the use of land is restricted. Yet it played no role whatsoever in *Lucas*, where the state was required to compensate in full when it denied Lucas his right to build under circumstances indistinguishable from those here.

D. The Transferable Development Rights Do Not, As A Matter of Law, Constitute Just Compensation For The Development Rights Taken Under TRPA's Comprehensive 1987 Plan.

Properly deployed, TDRs can serve as a useful tool for land use planning. TDRs are proper constitutional devices when the state first condemns *for cash* the development rights from individual landowners. Thereafter it may hold these in reserve or resell them to private owners for use. Because full and just compensation has been paid at the outset, the state has every incentive to make sound decisions on whether to use, resell, or retire the rights. The system of direct condemnation avoids any excessive imposition on individual landowners. The state deployment can then achieve any community objective reached through democratic means. In this case, the

strong preservation of property rights aids the deliberative process by forcing its representatives to consider the *impact* of its planning proposals on all individuals within the community, including those who own property there but who may not be eligible to vote. *See Pennell v. City of San Jose*, 485 U.S. 1, 22 (1985) (Scalia, J., dissenting). This system is easy to administer and was proposed for use in Chicago. John Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574 (1972); John Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 86-87 (1973).

However, TDRs become an affront to the constitutional protection of property rights when they are given to individual landowners in part payment for the ordinary development rights of which they have been deprived. Now, instead of introducing transparency in social decision-making, they seek to use "off-budget" devices to force some individuals to bear a disproportionate burden of actions taken in the name of the public good. Let the state pay in money and it is an easy matter to determine whether proper compensation has been paid. Let it pay with TDRs and the state will take refuge in the uncertainties of valuation that it has deliberately injected into the overall situation.

The basic point was made by Justice Breitel in his well-reasoned decision in *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), whose facts bear a close relationship to the instant case. There the plaintiff owned a large mid-Manhattan residential complex that contained two private parks zoned for residential and office development. An amendment to the New York City zoning law reclassified the land as a Special Park District, such that title remained in the private landowners even though the land was held open to the public. Then, New York City stipulated that original development rights for the two parcels were transferable to other locations in mid-Manhattan. The opening of the

lands to unlimited public use was treated as a taking. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Justice Breitel, writing for a unanimous court of appeals, refused to allow the City to credit the TDRs against its compensation obligation:

> [The City's action] thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.

Fred F. French, 39 N.Y.2d at 597-98, 350 N.E.2d at 387-88.

This Court does not have to hold such a negative view on TDRs as to refuse to credit them toward the compensation owing. It is quite sufficient to say that any value that inheres in them is rendered highly uncertain by the nature of the right. New York City was responsible for the creation of that indefiniteness in *Fred F. French*. TRPA is responsible for that indefiniteness here. The party that creates the risk should be required to bear its associated costs. By valuing these rights at zero, the Court sends a clear message to municipalities that TDRs

cannot be used to muddy the waters when a clear function of the courts is to secure full and perfect compensation for the property taken.

Following *Fred F. French* will not unduly limit the ability of local governments to make responsible decisions on land use. In *Fred F. French*, Chief Judge Breitel articulated the position urged here, noting with approval the sensible use of TDRs found in the so-called Chicago plan, which met the conditions of a sound TDR plan set out above because it required local governments to condemn development rights "instantly and in money." *Fred F. French*, 39 N.Y.2d at 598, 350 N.E.2d at 388.

The incentives of the Chicago system are completely different from those under New York City's scheme and TRPA's plan. First, local governments no longer have any incentive to cast the net for these development rights too widely. The cash payments for them must be made out of public budgets so that local officials will now be disciplined in their acquisition plans, just as they are when raw land or completed structures are acquired through standard condemnation practices. Second, local governments have an incentive to repackage these development rights in usable form in order to maximize the amount of cash received from their sale. It is most unlikely that it will break them up into development rights, land coverage rights, and building allocations, as are done under the TRPA plan. Third, the use of this system avoids the massive disparate impact that existed under the schemes in *Fred F. French* and the instant case because no landowner is wiped out by the process. All receive their fair share of benefits and burdens, so as to avoid the disparate impact of regulations that always raises suspicion under the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the Fifth Amendment guarantee was designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole")

To see why the dictates of *Armstrong* are satisfied, assume that 100 lots in the TRPA region are presently undeveloped, and the planning authority is willing to allow only 20 to be developed. Buying and banking development rights allow the state to hold development off the market and to find the highest bidder for the rights that can be immediately utilized. The government that imposes the restriction therefore bears the financial losses from the lots that it chooses to keep out of circulation. But it may correct any mistakes that it makes by auctioning off an additional set of development rights, just the way the FCC can auction off additional portions of the spectrum. *See, generally,* Ronald H. Coase, *The Federal Communications Commission,* 2 J. Law & Econ. 1 (1959).

In contrast, when TDRs are given to individual landowners as ostensible compensation for the property taken, local governments operate under a perverse set of incentives. It is far too easy to create the appearance that something of substance has been given, while fragmenting and conditioning the rights in ways so that their value approaches zero. For example, in *Fred F. French,* New York City's development rights could only be transferred within a certain portion of Manhattan; the receiving lots were "those with a minimum lot size of 30,000 square feet and zoned to permit development at the maximum commercial density." *Fred F. French,* 39 N.Y.2d at 592, 350 N.E.2d at 384. The rights could be transferred to the receiving lot, thereby increasing its maximum floor area up to 10%. Further increase in the receiving lot's floor area, limited to 20% percent of maximum commercial density, was contingent upon a public hearing and approval by the City Planning Commission and the Board of Estimate. Why assume that any market will emerge for these abstract disembodied development rights? And why value them at more than a tiny fraction of the

common law development rights that pre-existed the zoning change of the original private parks? In this case, the TDRs are fragmented into three separate components which, even when reassembled, can only be used subject to planning approval. And if this scheme is approved, there is every reason to suppose that the next generation of TDRs will be more restrictive and less valuable than those that have preceded it.

Should this plan be approved, land use plans that violate *Armstrong*'s warning against disproportionate impacts will be routinely adopted. Before the onset of TRPA's 1987 plan, one could assume (for illustration only since the record gives no precise numbers) that half the lots under TRPA's jurisdiction had single family homes, and the rest had none. The public determination was made to limit construction on the remaining lots for the benefit of all owners. If the Chicago TDR bank proposal had been followed, the burdens of this public scheme would have been borne equally by established and potential homeowners. But once TRPA's elaborate system of TDRs is put into place, the incidence of the public burdens shifts. Existing homeowners bear none of the cost of the plan, and indeed benefit from the increased value of their existing holdings. All owners of undeveloped plots lose, some more than others. The possibility of the resale of the vacant land to neighbors, TRPA, or some other governmental entity, and the possibility of some independent sale of TDRs shift *none* of the burden of the conservation scheme to the established homeowners. It only spreads it around in some uncertain fashion among the owners of undeveloped lots. Before the scheme was imposed, all of these lot owners had development rights. After the scheme was imposed most have neither the development rights nor their cash equivalent. The bottom line is that, over the life of this program, people who started with development rights will be stripped of them without compensation.

Nor is the use of TDRs as valid compensation devices implicitly authorized by *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978). That decision upheld the application without compensation of a landmark designation statute that prevented the construction of a 50 story office tower above Penn Station. In explaining that decision, Justice Brennan had these observations about TDRs:

> Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on the appellants, and, for that reason, are to be taken into account in considering the impact of the regulation.

Penn Central, 438 U.S. at 137.

This precarious compromise over TDRs does not survive scrutiny. If the TDR only mitigates the loss in question, then it leaves unsatisfied some portion of the underlying constitutional obligation to make full and perfect compensation. Yet there is no reason for TDRs to remain in constitutional limbo. The remainder of Justice Brennan's opinion explains how the landmark preservation statute at issue in *Penn Central* should pass constitutional muster even if no TDRs are provided. In sharp contrast to the situation here

> the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal

> containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Penn Central, 438 U.S. at 136.

Then to drive home the point, the Court emphasized that its holding was "based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion." *Id.* at 136 n.36. These strictures are a far cry from the instant case where the landowner is denied her primary expectation of building on a building lot, and is restricted to the most incidental uses of property – *e.g.*, gardening, picnicking, etc. – that offer no prospect of "a reasonable return" on investment. In *Penn Central*, the TDRs were the icing on the cake that preserved established uses. They did not and could not constitute the just compensation required when all beneficial use of the land was denied. As then-Justice Rehnquist stressed in his *Penn Central* dissent:

> Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." . . . And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." The fact that appellees may believe that TDR's [sic] provide full compensation is irrelevant.

Penn Central, 438 U.S. at 150-51 (quoting *Monongahela*, 148 U.S. at 326).

Clear limits have to be placed on the use of TDRs as in-kind compensation for regulatory takings. A strong

presumption should be erected against substituting them for cash outside the context of the Chicago plan, given the difficulties of evaluation and finality they pose. In principle, a government may well be prepared to devise a set of TDRs that has a readily realizable and ascertainable market value that makes them close equivalents to cash. If these conditions are satisfied, they could count as just compensation.

Yet we believe that it is unlikely that these conditions will be satisfied. Creating a system of TDRs costs the public money, which makes their use more cumbersome than cash. Why would a state or local government prefer to bear the costs of creating these requirements if they could not thereby find some way to circumvent the strict constitutional standards on compensation? We therefore predict that few if any schemes will be implemented that meet the strict constitutional requirements set out in *Monongahela* and in this brief. For the moment, however, it is not necessary to erect a per se rule on the question. It is sufficient in this case to refuse categorically to credit the TDRs offered by TRPA in lieu of its constitutional obligation to compensate Ms. Suitum.

III. ALLOWING TDRs TO SUBSTITUTE FOR CASH OPENS THE DOOR TO A HOST OF OTHER POLITICAL ABUSES.

This case has great precedential importance for unless this Court takes a firm stand, state and local governments will inaugurate a whole host of other programs to circumvent their obligation to pay compensation for either physical or regulatory takings. Consider, for example, the question of whether the government may discharge its compensation obligations by substituting financial instruments for cash. No decision of this Court has decisively settled this issue. For a collection of the relevant authorities, *see* Douglas T. Kendall & James

Ryan, *"Paying" For the Change: Using Eminent Domain To Secure Exactions And Sidestep Nollan and Dolan*, 81 Va. L. Rev. 1801, 1837-41 (1995). But the issue does admit of a principled answer once the amount owing from the state has been settled. Money should be the only allowable form of explicit compensation. The state should cure a cash shortage by borrowing in capital markets, not by imposing additional obligations on those people it has already singled out as targets for its coercive action.

To see why, assume that the state owes $100,000 for the outright taking of an ordinary piece of land. No slippage in the discharge of that obligation is possible if the state is forced to make good on that obligation in cash. But let the state pay in kind, and the landowner will receive a note whose face value is $100,000, but whose market value is likely to be far less. (No state would ever voluntarily pay with a note worth more than $100,000.) After all, it is commonplace that the market value of financial instruments, when issued, can diverge dramatically from the face amount of the instruments. The specially-tailored note might carry a below-market rate of interest, be backed by inadequate security, or be hedged in by terms and conditions. The note might be nonassignable by the landowner, who must wait a period of years to receive its cash value; yet, the state could have the option to call the note at any time. Why force a landowner to fight two battles and a trial court to make two separate valuations – one for the land and the other for the note – when the capital markets can better value any note the state might care to issue?

The state's taking power may be essential to overcome the individual power to hold out against needed government projects. But money is fungible, so there is no remotely comparable social objective to allow the state to discharge its compensation obligations with notes of questionable value. No private judgment debtor could freely substitute a personal note for cash. Nor could any

buyer of real estate. Why invite abuse by adopting a different rule for state compensation when neutral parties operating in competitive capital markets can cheaply and reliably evaluate financial instruments? A simple rule of constitutional prudence should dictate that explicit compensation always be paid in money, both for physical occupations and regulatory takings.

The above proposition only applies, it must be stressed, when explicit compensation must be paid. It hardly follows therefore that TDRs should be allowed as compensation just because in-kind compensation is allowed in other cases. By drawing the correct distinctions, this Court can, and should, leave undisturbed the evaluation rules applicable when in-kind compensation for any given property holder is derived from the same government scheme that takes private property. In *Bauman v. Ross*, 167 U.S. 548 (1897), this Court held the state could offset from any compensation owed the benefits that accrue to the landowner as a direct consequence of the project in question. Thus, suppose that a landowner has 100 fungible acres worth $100,000, of which 20 are taken for a highway. The compensation owing is presumptively $20,000. But if the remaining holdings of the landowner increase in value to $85,000 because of superior highway access, the amount of cash compensation owing is only $15,000. This principle is perfectly neutral, for should the severance of part of the land reduce the value of the residue to $75,000, then the compensation owing is increased to $25,000. Both cases respond to the same ideal: the landowner's total wealth position should remain at $100,000 when the transaction runs its course.

Note the difference between these in-kind benefits and TDRs. TDRs are artifacts of some accounting conventions; these offsets by contrast reflect real changes in underlying values of the retained property. The unified parcel had a market value before the taking took place, and the portion retained by the original owner retains

some market value once that taking is completed. Unlike the dangers with financial instruments that do not have fixed value, the variations in value in the land cases can run in either direction depending on the relationship between the portion of the land taken and that retained. Since the valuation can move in both directions, the landowner is no longer exposed to systematic risk that the state will use papers of inflated or uncertain value to escape its financial obligations.

These cases of implicit benefits and burdens help place in context some broad statements that the state need not always provide compensation in cash. *See, e.g., The Regional Railroad Reorganization Cases*, 419 U.S. 102, 150 (1974) ("no decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes"). That general statement works best in the cases just mentioned where material benefits flow directly from the government occupation of land, or, in the present situation, from the use restrictions imposed on land. As applied to this case, Ms. Suitum could not challenge any reduction in dollar compensation if the very development ban she protests increased the value of her land by imposing like-restrictions on the property of her neighbors. In the overall scheme of things, this qualification of the basic rule is no small matter, for the fundamental justification of sound zoning schemes rests on the proposition that the value lost from the restriction on one's own land is offset by the benefits imposed on the land of a neighbor:

> A zoning scheme, after all, is similar in some respects to a contract; each party forgoes rights to use its land as it wishes in return for the assurance that the use of a neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare.

Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 517, 522 P.2d 12, 19 (1974).

Yet, by the same token, these reciprocal benefits cannot simply be presumed because some general ordinance has been put in place. In the instant case, Ms. Suitum is not allowed to develop her land; and no evidence in the record hints that she owns any nearby parcels of developed land that benefit from the restriction. Any offsets inhere to the neighbors who benefit from the open space and the opportunity to buy that land at a small fraction of its pre-restriction value. The basic incentive structure that influences local deliberation must change before any in-kind offsets come into play in this case. This case is not one in which the challenged ordinance restricts all landowners to one single-family home per standard lot, and allows them freedom as to when it may be built. Rather, it is a textbook example of how the early comers pull up the bridge and deny to other owners (who often are not local voters) the power to do what they have done. Any nuanced interpretation of the takings clause should be alert to these differences.

To see the potential for constitutional evasion, one should consider the proposal defended at enormous length by Kendall and Ryan in *"Paying" for the Change: Using Eminent Domain To Secure Exactions and Sidestep Nollan and Dolan*, 81 Va. L. Rev. 1801 (1995). True to the title of their article, they propose to "sidestep" constitutional obligations by dismantling the constitutional protections against illicit exaction that this Court erected in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Their proposal quite simply is that local governments resort to eminent domain to avoid paying cash for land: "where the value of a development permit exceeds the value of the land exaction sought by the town, the town should

take the land through eminent domain and give the landowner the choice between cash compensation and compensation in the form of a development permit." Kendall & Ryan, 81 Va. L. Rev. at 1803. The individual property owner will of course be better off by accepting the permit, so that the land can in effect be acquired for free, which is why the term "paying" is placed in quotes in the title of their article.

While academic discourse permits such inventive shell games, the Constitution does not. Here, adherence to constitutional requirements will not take place if a government can use the funny money of TDRs or other land use restrictions to discharge its constitutional obligation of just compensation. The entire purpose of both *Nollan* and *Dolan* is to insure that the state does not use its power of regulation to acquire the possession or use of land for free. That can be done only if the state is not allowed to create new rights out of whole cloth for the acquisition of land. Requiring that the compensation for the land taken be provided solely and exclusively in money puts an end to this sham, just as it puts an end to the abuses inherent in using TDRs as direct compensation. Upholding the use of TRPA's TDR scheme invites an unwarranted deterioration of the constitutional safeguards erected in *Nollan* and *Dolan*.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed, and the case should be remanded to the District Court with instructions that TRPA pay full and just compensation for the property taken.

Respectfully submitted,

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